



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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March 8, 2000

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Acting Staff Director

FROM: Lawrence M. Noble *[Signature]*
General Counsel

N. Bradley Litchfield *NBL/RS*
Associate General Counsel

Michael Marinelli *[Signature]*
Staff Attorney

SUBJECT: Draft AO 2000-2- Alternative Drafts

AGENDA ITEM
For Meeting of: 3-16-00

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for March 16, 2000.

These drafts address the question of whether a candidate may rent to his principal campaign committee his office space where the office space is located in the same rented premises containing his residence. Draft A, which the Office of General Counsel recommends for approval, answers the question in the negative. This draft is based on what this Office believes is a strict reading of the regulation at issue. Draft B permits the arrangement proposed in the request and includes in its rational distinguishing factors that various Commissioner's offices have suggested in their discussions concerning this request. Bolded print is used in Draft B to indicate where it differs from Draft A (these changes are found on pages 5 and 6 of Draft B). While the Office of General Counsel recommends the adoption of Draft A, it presents Draft B to facilitate the Commission reaching consensus on the issues raised in this request.

Attachments

1 **ADVISORY OPINION 2000-02**

2

3 **Rick Hubbard**

DRAFT A

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Rick Hubbard for U.S. Senate

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57 Depot Street

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P.O. Box 1444

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Stowe, VT 05672

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Dear Mr. Hubbard:

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This refers to your letters dated February 19, and January 19, 2000, concerning the

12

application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and

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Commission regulations to the rental by your campaign committee, Rick Hubbard for U.S.

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Senate, of personal and real property owned by you.

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FACTS

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You state that for many years prior to the announcement of your candidacy on

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September 7, 1999, you have worked as an attorney under your own name in Stowe,

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Vermont.¹ For several years, you have worked independently on a full time basis as an

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attorney without other staff support. In this regard, you explain that you rent the top 1 ½

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floors of space in a three story commercial building in downtown Stowe.² On the top

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floor you have your office, together with a desk, a desktop computer, two printers, a

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scanner, a fax machine, a copier, a notebook computer, a video/television, phones, an

¹ In your February 19, 2000 letter you state that you have already qualified as a candidate under 2 U.S.C. §431(2) by having reached \$5,000 in contributions.

² Your request provides additional background regarding the location of your offices. You explain that the commercial area of Stowe (a resort community with a year round population of 3,500) is 3 square blocks. Most of the buildings located in this commercial area are of clapboard frame construction and do not exceed 2-3 stories. The building which houses your office and residence has three stories with your third story being in the top of the building. The 1st floor of the building is occupied by a local family restaurant. Half of the second floor is used as an office by the owner-proprietor of the restaurant. You occupy the remaining half of the second floor and the entire 3rd floor. The buildings in the vicinity are used by small commercial enterprises, government services or small professional offices. An example of the occupying establishments include an inn, a post office, an antique dealer and different offices used by a doctor, trader/investor, and contractor. One of these buildings also contains an apartment.

1 answering machine, meeting and conference facilities, shelving, filing cabinets and other
2 office furniture and furnishings. The lower floor consists of the office (and your personal)
3 bathroom, together with your primary residence, with bedroom and related living space.

4 You explain that a person enters into the leased space through a common door
5 and, from the open interior hallway, either goes up a flight of stairs to the office area or
6 turns left through a door to your personal area. You further explain that for years (for
7 payment and tax purposes), you have split the cost of rent, electricity and other utilities on
8 a 50/50 basis between your law practice office and your personal area. All of the office
9 equipment, machinery, computers and related professional items are owned in connection
10 with your law practice.

11 You state that you are currently using all of this office space and equipment as
12 campaign headquarters for Rick Hubbard for U.S. Senate. Since announcing on
13 September 7, 1999, you have worked essentially full time on your campaign, and you
14 anticipate continuing this pattern through the November 2000 election. Although you are
15 taking on no additional legal work from new clients, you will occasionally perform follow
16 up attorney services for existing clients.

17 You further explain that you could have sublet your unused law office facilities to
18 others and leased separate office space for the campaign. However, this would have been
19 both less efficient and more expensive. Consequently, you decided to locate your
20 campaign headquarters in the office portion of the premises. Due to the fact that your
21 single, combined monthly rent payment is for space used 50/50 for office and personal
22 purposes, you request an advisory opinion on the applicability of the "irrespective test" to
23 these "unusual" circumstances. You indicate that you expect no campaign reimbursement

1 for your personal use of the described premises. However, for that half of the monthly
2 rent relating to your office activities, and for all use of your office computers, equipment
3 and related items as discussed above, you believe a fair level of reimbursement from your
4 campaign committee is appropriate. Since you will have some use of this office equipment
5 by your very limited legal practice (which you estimate will average much less than 25%
6 over the entire period through November 2000), you assert that a fair method of payment
7 would be for your committee to reimburse you as follows: as to the portion of rent which
8 applies to office use -- at a rate of 75% of the actual cost; as to use of your office
9 computers, furniture, furnishings and equipment as discussed above -- at a rate which is
10 75% of the typical rental value of such items of comparable age and serviceability.

11 **ACT AND COMMISSION REGULATIONS**

12 The Commission has previously stated that, under the Act and Commission
13 regulations, a candidate and the candidate's campaign committee have wide discretion in
14 making expenditures to influence the candidate's election. The Act provides, however, that
15 the candidate and the campaign committee may not convert excess campaign funds to the
16 personal use of the candidate or any other person. 2 U.S.C. §439a; 11 CFR 113.2(d);
17 Advisory Opinions, 1995-8, 1994-22, 1994-8 and 1991-1.

18 The Commission regulations define what would constitute personal use of campaign
19 funds. In general, "personal use" means "any use of funds in a campaign account of a
20 present or former candidate to fulfill a commitment, obligation or expense of any person
21 that would exist irrespective of the candidate's campaign or duties as a Federal
22 officeholder." 11 CFR 113.1(g). The regulations specifically address payments by a
23 committee for rental of a candidate's property, and they provide that personal use includes:

A

1 (E) Mortgage, rent or utility payments--

2 (1) For any part of any personal residence of the candidate or a member of the candidate's
3 family; or

4 (2) For real or personal property that is owned by the candidate or a member of the
5 candidate's family and used for campaign purposes, to the extent the payments exceed the
6 fair market value of the property usage. 11 CFR 113.1(g)(1)(i)(E)(1) and (2). The
7 effective date of the regulations was April 5, 1995. See 60 *Fed. Reg.* 17193 (April 5,
8 1995).

9 **APPLICATION TO PROPOSAL**

10 The Commission's Explanation and Justification of these regulations explains the
11 proper application of these definitions as they relate to campaign use of candidate-owned
12 property. It states that, in the past, the Commission has generally permitted campaigns to
13 rent property owned by a candidate or a family member for campaign use, so long as the
14 campaign paid no more than the usual and normal rental. The rule at paragraph
15 (g)(1)(i)(E) provides, however, that the use of campaign funds to rent all or part of a
16 personal residence of the candidate or a family member is personal use, even if part of the
17 personal residence is being used in the campaign. On the other hand, the cited paragraph
18 permits the use of campaign funds for the rental of property owned by the candidate (but
19 not occupied as a residence) or a family member, where the property is rented for campaign
20 purposes and is not part of a personal residence of either the candidate or a family member.
21 A campaign committee may therefore rent, for campaign use, part of an office building
22 owned by the candidate so long as it pays no more than the fair market value. Commission
23 Regulations on Personal Use of Campaign Funds, Explanation and Justification, 60 *Fed.*

1 *Reg. 7862, 7865 (February 9, 1995); see also Advisory Opinion 1995-8. The Commission*
2 *notes that in its Explanation and Justification of the regulations, several previous opinions*
3 *were superseded by the cited personal use regulations.³*

4 Your situation is distinguishable from a prior opinion found consistent with the
5 personal use regulations. In Advisory Opinion 1993-1, the Commission approved the use
6 of campaign funds to pay for the rental of a separate and detached storage shed located on
7 the same real estate (or land) where the candidate maintained his personal residence.
8 Applying the 1995 regulations in Advisory Opinion 1995-8, the Commission approved the
9 use of campaign funds to pay for the rent of office facilities by a candidate’s campaign
10 committee in a building owned by the candidate which was two miles from the candidate’s
11 residence. In contrast to the facts in these two opinions, the office space which your
12 campaign committee would use is an integral, inseparable part of the dwelling used by you
13 as a personal residence. The Commission notes that there is a common entrance and
14 bathroom facilities. Applying the cited rule, the Commission, therefore, concludes that the
15 use of campaign funds to pay rent and utility costs for the use of office space in the same
16 rental facilities that are also your personal residence would constitute personal use under 2
17 U.S.C. §439a and 11 CFR 113.1(g). Thus, campaign funds may not be used for this
18 expense.

19 In contrast, section 113.1(g) would permit the rental of your law office equipment to

³ The circumstances in your request are similar to those of several opinions expressly superseded and overruled by the cited regulations. See Advisory Opinions 1988-13 and 1985-42. For example, in Advisory Opinion 1985-42, a candidate proposed to lease an apartment in Washington D.C., and wished to share use of the apartment with his campaign committee staff. In Advisory Opinion 1988-13, cited in your request, a candidate owning a residential duplex in his home district wished to rent part of the duplex to his campaign for office and storage space while he still utilized the remaining areas as a personal residence when he was in his district.

1 your campaign committee as long as the rental amount charged is not above the usual and
2 normal rental charge for such equipment according to the percentages that you suggest.⁴

3 The Commission expresses no opinion regarding any tax ramifications of the
4 proposed activity, because those issues are not within its jurisdiction.

5 This response constitutes an advisory opinion concerning the application of the
6 Act, or regulations prescribed by the Commission, to the specific transaction or activity set
7 forth in your request. See 2 U.S.C. §437f.

8 Sincerely,

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10
11 Darryl R. Wold
12 Chairman
13
14

15 Enclosures (AOs 1995-8, 1994-22, 1994-8, 1993-1, 1991-1, 1988-13, and 1985-42)
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⁴ This would also be consistent with the Commission's approach in Advisory Opinion 1995-8. If you should charge your campaign less than the usual and normal charge, the difference would constitute a contribution to your campaign. Your legal practice does not appear to be a corporation so the contribution would be permissible and treated as contributions by you to your campaign. Commission regulations permit a candidate to make unlimited contributions to the candidate's campaign from personal funds. See 11 CFR 110.10.

1 **ADVISORY OPINION 2000-02**

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DRAFT B

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11 **This refers to your letters dated February 19, and January 19, 2000, concerning the**
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17 **September 7, 1999, you have worked as an attorney under your own name in Stowe,**
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19 **attorney without other staff support. In this regard, you explain that you rent the top 1 ½**
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1 *Reg. 7862, 7865 (February 9, 1995); see also Advisory Opinion 1995-8.*

2 **The Commission notes your situation is somewhat unique from the past-**
3 **situations considered by the Commission, in that your office space also contains your**
4 **personal residence. However, there several factors which make your proposal**
5 **permissible under the cited regulation. First, your use of the leased property as both**
6 **a residence and an office predates your candidacy by several years and, from the**
7 **detailed description you provide, the leased premises are located in a commercial**
8 **rather than residential area of Stowe. The Commission further notes that the**
9 **premises serves as your sole office space and that for several years you have followed**
10 **a tax treatment of the rent paid that reflects the division between residential and**
11 **office space which you present in your request. Finally, your request would apply**
12 **campaign funds only to the portion of rent which previously had ascribed to your law**
13 **office use. Therefore, for the above reasons and with this limitation in mind, you**
14 **may use campaign funds to pay the rent of your office pace as long as the rental**
15 **amount charged is not above the usual and normal rental charge for such rental**
16 **according to the percentages that you suggest.³ See Advisory Opinion 1995-8. The**
17 **Commission concludes that the use of campaign funds to pay rent and utility costs**
18 **for the use of office space in the same rental property that also contains your**

³ This would also be consistent with the Commission's approach in Advisory Opinion 1995-8. If you should charge your campaign less than the usual and normal charge, the difference would constitute a contribution to your campaign. Your legal practice does not appear to be a corporation so the contribution would be permissible and treated as contributions by you to your campaign. Commission regulations permit a candidate to make unlimited contributions to the candidate's campaign from personal funds. See 11 CFR 110.10.

1 **personal residence in these specific circumstances would not constitute personal use**
2 **under 2 U.S.C. §439a and 11 CFR 113.1(g).**

3 Section 113.1(g) would also permit the rental of your law office equipment to your
4 campaign committee, again, as long as the rental amount charged is not above the usual
5 and normal rental charge for such equipment according to the percentages that you
6 suggest.

7 The Commission expresses no opinion regarding any tax ramifications of the
8 proposed activity, because those issues are not within its jurisdiction.

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15 Chairman
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